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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/733,414
Filing Date: December 12, 2003
Appellant(s): CURTIN, CAITLYN

John E. Curtin
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed January 20, 2010 appealing from the Office action mailed August 19, 2009.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner. All rejections under 35 USC 112, first paragraph are withdrawn. The rejections with respect to 35 USC 112, second paragraph regarding the "securing means for" and "muffler means for" are also withdrawn.

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct, with the exceptions noted above.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5822878	Jones	10-1998
5857263	Chan	1-1999
5970622	Bahman	10-1999
6038786	Aisenberg	3-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

Claims 1-14 are rejected under 35 U.S.C. 112, second paragraph, as failing to set forth the subject matter which appellant regard as the invention. Evidence that claims 1-14 fail to correspond in scope with that which appellant regard as the invention can be found in the reply filed February 29, 2008. In that paper, appellant has stated “movement means” and “control means” should be construed more narrowly than the *Hyatt* decision. Appellant argues that the figures “clearly shows the means as part of the hair and body dryer,” but that figure does not show structure, such that the claims can be reasonably and broadly construed to be interpreted in light of the specification, as rejected under the prior art below. Similarly the arguments concerning “control means or the like” is construed to be indefinite, because the “or the like recitation” is reasonably and broadly construed to be any type of control means, such as the means

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disclosed in the prior art discussed below. This “or the like” recitation is indefinite because it includes an infinite number of embodiments, contrary to appellant’s arguments. Simply stated, applicant’s disclosure does not provide adequate supporting structure as to what structure or functional equivalent structure is intended as a “movement means” that is controlled by the “control means” such that one of ordinary skill in the art would understand the metes and bounds of the claim limitation. See *Aristocrat Technologies Australia Pty Ltd. v. International Game Technology* 86 USPQ2d 1235, 521 F3d 1328 (Fed. Cir. 2008). The recited means plus function language will be addressed in light of the prior art as discussed in the rejections below.

Claim Rejections - 35 USC § 102

Claims 1-3, 5-6, 8, and 13-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Jones (US 5,822,878). The claimed invention is construed under the current practice for claim language falling within 35 USC 112, sixth paragraph, as discussed above in the rejection, stated in a prior answer, but more clearly answered here. As remanded, each of the “means” claim language will be first interpreted before applying the prior art, as required by 35 USC 112, sixth paragraph. The “movement means” is specified at paragraphs [0011] and [0012] as first and second movement means which may comprise a pivoting mechanism or the like. Since the specification recites “may comprise” and “or the like,” it does not clearly link or associate that structure to the function recited in the claim because the specification is indefinite and open ended such that any means of movement would be satisfied to meet the claim language and specification structure. The “control means” is specified at paragraphs

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[0018] , [0020], and [0025] as control means which may comprise a removable or built-in remote control, a timer, and sensors or appropriate circuitry, respectively. Again, since the specification recites “may comprise,” it does not clearly link or associate that structure to the function recited in the claim because the specification is indefinite and open ended such that any means of control would be satisfied to meet the claim language and specification structure. However at specification paragraph [0025], the control means contains sensors and appropriate circuitry which will be used to consider limitations with respect to the corresponding structure thereof as required by 35 USC 112, sixth paragraph. Since the specification recites “may comprise” and “or the like,” it does not clearly link or associate that structure to the function recited in the claim because the specification is indefinite and open ended such that any means would be satisfied to meet the claim language and specification structure. Jones discloses the claimed dryer comprising:

a diffuser 30, 34, or 36 for allowing air to exit or to dry a surface of a user's body as disclosed in column 4 lines 43-67 of Jones wherein the disclosed “operator,” “he,” “passenger,” or “driver” discloses the claimed intended use “for allowing air to exit and dry a user body surface” since that desired result can be reasonably and broadly construed, in light of the accompanying specification, to be the surface of a user's body in the disclosed vehicle (and wherein the disclosed nozzle is construed to anticipate the claimed diffuser because both allow air to exit in order to dry a surface of a user's body as claimed and the claimed user is broadly and reasonably construed in light of the specification to include any being capable of being prevented from touching movement

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means as specified in paragraph [0014], or may be user held as specified in paragraph [0015], or allow mirror use as specified in paragraph [0015] such that claimed diffuser is capable of performing the intended use of allowing air to dry a user's body surface);

movement means 46 & 48 for moving the diffuser over a wide range of angles in order to dry different parts of the surface (wherein the disclosed motor 46 whose output shaft is connected via a belt and pulley system 48 is construed to anticipate the claimed movement means because at column 5 line 35 through column 6 line 55, a wide range of drying angles is expressly disclosed, especially at column 6 lines 18-31; furthermore the disclosed motor shaft belt and pulley system performs an identical function as the claimed and specified movement means because both have a pivoting mechanism or the like best shown in figures 2 & 3 of Jones wherein both structures perform the function in substantially the same way, i.e. sweeping a nozzle over a user body, with substantially the same result, i.e. drying a user body); and

control means 52 for sending instructions to the movement means in order to control the movement of the movement means over the wide range of angles (wherein the disclosed screw drive 50 received in a receptacle assembly 52 connected to nozzle 30 via arms 54 and 56 is considered to anticipate the claimed control means because at column 5 lines 47-51, mechanical structure inherently sends instructions to the claimed movement means to control a wide range of drying angles because it is this disclosed linkage that causes movement of one element, i.e. screw drive 50, to "instruct" movement to be "sent" to another element such as a nozzle 30; furthermore the disclosed receptacle assembly with arms and screw drive performs an identical function

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as the claimed and specified control means because both have a removable or built-in remote control best shown in figure 1 of Jones wherein both structures perform the function in substantially the same way, i.e. remotely controlling the dryer in a timed cyclic manner to send instructions to the movement means, with substantially the same result, i.e. drying a user body). The control means has been construed to invoke the sixth paragraph of 35 USC 112 since the means for language is used, which is further modified by functional language, but is not considered to be modified by sufficient structure, material or acts for achieving the specified function (please see the claim construction under the sixth paragraph of 35 USC 112 above). Jones also discloses the claimed securing means 62 because the disclosed trolley which includes rollers 66 along a rail 68 attached via a cable 58 and a pulley 60 interconnected with center nozzle which performs an identical function as the claimed and specified securing means because both have a combination of a receptacle and main pole best shown in figures 5 & 6 of Jones wherein both structures perform the function in substantially the same way, i.e. combining a receptacle and main pole, with substantially the same result, i.e. moving the dryer nozzle up and down, wide range of angles selection (column 6 lines 18-23), preprogrammed movement control means (column 6 lines 1-17), programmable control means 214, a muffler means (column 5 lines 6-9 wherein the disclosed open cell polyurethane foam to reduce noise performs an identical function as the claimed and specified muffler means because both protect nozzles baffling them from heat and moisture wherein both structures perform the function in substantially the same way, i.e., covering the nozzle with substantially the same result, i.e. protecting the

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nozzle), a timer (column 4 line 47), and wherein the control means is operable to send the instructions to the movement means without the need for a user to access the control means (column 11 lines 54-64).

Claim Rejections - 35 USC § 103

Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jones in view of Aisenberg et al. (US 6,038,786). Jones is considered to disclose the claimed invention, as discussed above under the anticipatory rejection, except for the claimed transceiver for detecting the presence or absence of a user, which is interpreted to be a motion or proximity sensor. Aisenberg, another dryer, is considered to disclose the claimed transceiver at column 7 lines 23-39. It would have been obvious to one skilled in the art to combine the teachings of Jones with the considered disclosed transceiver, disclosed by Aisenberg for the purposed of controlling user drying operations by automating the activation of a drying means by proximity or motion sensing.

Claims 7 and 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jones. Jones is considered to disclose the claimed invention, as discussed above under the anticipatory rejection, except for the claimed lightweight material construction and heat sensitive, resistant, or tolerant material. It would have been an obvious matter of design choice to provide any type of construction material, since the Appellant has not patentably distinguished those types of claimed construction material from those found in the prior art cited in this action, along with the fact that any of the prior art references teach that it would be obvious to provide lightweight material construction and heat sensitive, resistant, or tolerant material.

Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jones in view of Bahman (US 5,970,622). Jones is considered to disclose the claimed invention, as discussed above under the anticipatory rejection, except for the claimed removable remote control. Bahman, another dryer, is considered to disclose the claimed removable remote control at column 2 lines 23-34. It would have been obvious to one skilled in the art to combine the teachings of Jones with the considered disclosed removable remote control, disclosed by Bahman for the purposed of controlling user drying operations by allowing remote access for control.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Jones in view of Chan (US 5,857,263). Jones is considered to disclose the claimed invention, as discussed above under the anticipatory rejection, except for the claimed retractable power cord. Chan, another dryer, is considered to disclose the claimed retractable power cord at column 2 lines 29-40. It would have been obvious to one skilled in the art to combine the teachings of Jones with the considered disclosed retractable power cord, disclosed by Chan for the purposed of changing the length of the power supply for the drying and allowing dryer use at different locations.

(10) Response to Argument

35 USC 112, second paragraph

Although appellant does not appeal the rejections under 35 USC 112 second paragraph, only those rejections with respect to “movement means for” and “control means for” will be maintained and answered here.

As claimed, the "movement means for moving the diffuser over a wide range of angles in order to dry different parts of the surface; and control means for sending instructions to the movement means in order to control the movement of the movement means over the wide range of angles" is construed to be indefinite.

Since the means plus function language is used, and all the requirements for the invoking the sixth paragraph of 35 USC 112 are met. More specifically, the claim limitations use the "means for" language modified by functional language but not modified by sufficient structure, material, or acts for achieving the specified function *In re Donaldson Co.*, 16 F.3d 1189, 29 USPQ2d 1845 (Fed. Cir. 1994).

In this application, both "means for" claim recitations must be defined by the structure disclosed in the specification plus any equivalents of that structure; in the absence of structure disclosed in the specification to perform those functions, the claim limitation would lack specificity, rendering the claim as a whole invalid for indefiniteness under 35 U.S.C. §112 ¶ 2. See *Donaldson*, 1195. As discussed above in the prior art and indefinite rejections, the movement means and the control means are not tied to any structure making those features indefinite. The movement means for moving the diffuser is tied to the control means for sending instructions to the movement means. Both combination of features do not have support in the specification to overcome the rejection of indefiniteness. On pages 5 and 6 of appellant's brief, the argument that the control means comprises circuitry or the like which is programmed or programmable to send instructions to both movement means resulting in movement of lower or upper body is merely an algorithm, which is not patentable under current Office practice.

The claimed movement means and control means is analogous to the Federal Circuit ruling with regard to display means and control means under *Aristocrat Technologies Australia Pty Ltd. v. International Game Technology* 86 USPQ2d 1235, 521 F3d 1328 (Fed. Cir. 2008). In that ruling, the Court found that the combination of display (movement) and control (control) means to be indefinite.

In cases involving a computer-implemented invention in which the inventor has invoked means-plus-function claiming, this court has consistently required that the structure disclosed in the specification be more than simply a general purpose computer or microprocessor. The point of the requirement that the patentee disclose particular structure in the specification and that the scope of the patent claims be limited to that structure and its equivalents is to avoid pure functional claiming. As this court explained in *Medical Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1211 [68 USPQ2d 1263] (Fed. Cir. 2003), "If the specification is not clear as to the structure that the patentee intends to correspond to the claimed function, then the patentee has not paid the price but is attempting to claim in functional terms unbounded by any reference to structure in the specification." See also *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 948 [83 USPQ2d 1118] (Fed. Cir. 2007) ("[I]n return for generic claiming ability, the applicant must indicate in the specification what structure constitutes the means."). For a patentee to claim a means for performing a particular function and then to disclose only a general purpose computer as the structure designed to perform that function amounts to pure functional claiming. Because general purpose computers can be programmed to perform very different tasks in very different ways, simply disclosing

a computer as the structure designated to perform a particular function does not limit the scope of the claim to “the corresponding structure, material, or acts” that perform the function, as required by section 112 paragraph 6.

That was the point made by this court in *WMS Gaming, Inc. v. International Game Technology*, 184 F.3d 1339 [51 USPQ2d 1385] (Fed. Cir. 1999). In that case, the court criticized the district court, which had determined that the structure disclosed in the specification to perform the claimed function was “an algorithm executed by a computer.” The district court erred, this court held, “by failing to limit the claim to the algorithm disclosed in the specification.” *Id.* at 1348. The rationale for that decision is equally applicable here: a general purpose computer programmed to carry out a particular algorithm creates a “new machine” because a general purpose computer “in effect becomes a special purpose computer once it is programmed to perform particular functions pursuant to instructions from program software.” *Id.*, quoting *In re Alappat*, 33 F.3d 1526, 1545 [31 USPQ2d 1545] (Fed. Cir. 1994). The instructions of the software program in effect “create a special purpose machine for carrying out the particular algorithm.” *WMS Gaming*, 184 F.3d at 1348. Thus, in a means-plus-function claim “in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm.” *Id.* at 1349. *Aristocrat* at 1240-41.

In this application, the claimed control means is a pure algorithm, since it is not tied to any structure. Since it is controlling the claimed movement means, another

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indefinite claim term, it makes the movement means a type of algorithm since it also is not tied to a structure, but rather "for moving the diffuser over a wide range of angles in order to dry different parts of [a] surface."

35 USC 102

In response to applicant's argument that the claimed "diffuser for allowing air to exit in order to dry a surface of a user's body" is patentable over Jones, that claim limitation is construed to be a statement of intended use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

In this application primary reference Jones meets the claimed intended use, because it allows air to exit in order to dry a surface of a user's body. With respect to the argument, that one of ordinary skill would never think of using the Jones dryer to dry a surface of a user's body, that argument misplaces the obviousness legal standard of one skilled in the art with the anticipatory standard. Jones meets the claim limitation because it meets the structure and function, as rejected above.

In response to the argued "wide range of angles" claim feature, appellant's admission that the Jones disclosed nozzle oscillation "over a very wide arcuate range" expressly meets that argued claimed feature.

35 USC 103

Each of the obviousness rejections are mere assertions of patentability and will be collectively addressed.

Applicant's arguments fail to comply with 37 CFR 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references.

Applicant's arguments do not comply with 37 CFR 1.111(c) because they do not clearly point out the patentable novelty which he or she thinks the claims present in view of the state of the art disclosed by the references cited or the objections made. Further, they do not show how the amendments avoid such references or objections.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Stephen Gravini/

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